United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

697

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee,	)	
v.	)	Docket No. 23,108
Milton L. Hayward, Appellant.	)	

BRIEF FOR APPELLANT

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Attorney for Appellant
(By Appointment)

I

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TABLE OF CASES

RULE 8(d)

This case has not previously been before this court.

RULE 8(e)

The ruling of the trial judge permitting witness Marks to identify appellant appears in the record at pages 46 and 47.

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* Case principally relied upon.

II

ISSUE PRESENTED

The issue presented on this appeal is whether, under all of the circumstances of this case, the on-the-scene and in-court identifications of appellant by the witness Marks deprived appellant of due process of law under the doctrine of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967).

III

STATEMENT OF THE CASE

Appellant was indicted on three counts of robbery, assault with a dangerous weapon and unauthorized use of a motor vehicle, all growing out of the same incident which occurred in the late evening and early morning of October 26 and 27, 1967. 1/

At about 11:05 P.M. on the evening of October 26, two men hailed a cab owned and driven by one Alvin Scott at the corner of Third St. and Florida Ave., N.W., in the District of Columbia, and instructed him to take them to the 2600 block of Douglas Road, Southeast (R. 11-13). Upon reaching the destination, the man sitting directly behind the driver grabbed him around the neck and "put a knife or sharp pointed object" to the back of his head and the two men then proceeded to rob him of his money and wrist watch (R. 15-16). They then told Scott to pull the cab

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1/ The jury was unable to reach a verdict on counts 1 and 2. Appellant was convicted on count 3.

over to the side, ordered him to move over to the right side of the front seat and remove his jacket. They then proceeded to cover his head with the jacket and the man directly behind the driver jumped over the seat and started driving. They drove around for thirty to forty minutes before letting Scott out of the cab on Southern Avenue, S.E., with instructions not to look back (R. 17).

Shortly thereafter, a Mr. Paul Marks, the Manager of the Naylor Theater on Alabama Avenue, having closed the theater for the night, hailed the same cab outside the theater and, seeing only the driver in the cab, got into the rear seat (R. 48-49). Upon entering, another passenger, a negro like the driver, rose up from the floor of the back seat (R. 50). After Marks announced that he wished to go to Maryland, the driver stated that he had to take the other passenger home first (R. 50). The driver then drove to a dead end street where an argument ensued between the driver and the original passenger who claimed not to have any money. The two men got out of the cab and proceeded about fifty feet away, where the argument appeared to continue. After a lapse of four or five minutes, they both returned to the cab and headed for Maryland. When the cab was approaching Massachusetts Avenue on Alabama, a police car heading in the opposite direction made a U turn and began to chase the taxi (R. 51). The chase, joined by at least three other police cars, continued until the cab driver

lost control at the intersection of Marlboro Pike and Southern Ave., struck another automobile, hit a Welcome to Maryland sign and came to a stop (R. 52).

Both the driver and the original passenger left the cab and ran down a hill into a wooded area. Police officers found the appellant lying on his back in the woods and arrested him (R. 76, 88). No trace of the other passenger was even found (R. 98).

Four witnesses were presented by the prosecution. The owner of the cab, who was allegedly assaulted and robbed, was unable to identify either of his assailants, although confronted with the defendant at police headquarters and during the trial (R. 27-28). The closest that witness Scott came to a description was that the first person entering the cab (presumably the appellant) had on a fingertip coat and a hat and the other was dressed in a topcoat and hat (R. 14).

Mr. Marks, the theater manager, was quite positive in his identification of appellant as the driver of the cab, first at the scene of the accident (R. 55-56), next at police headquarters (R. 43-44),[1/] and finally at the trial (R. 57). With respect to a description of his assailants, witness Marks was certain that the other passenger was dressed in a leather jacket (R. 32), but really couldn't recall how the

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1/ The trial judge did not permit the prosecution to bring out this identification in the presence of the jury.

appellant was dressed, although he believed that he was wearing a three-quarter length coat and a hat (R. 40).

Officer Bryant was driving a one-man police cruiser which was one of the four police cars chasing the fleeing cab (R. 70). Officer Bryant also claimed to recognize appellant as the driver of the cab (R. 73), although his first sight of appellant was when his cruiser pulled alongside of the cab at about 50 miles an hour (R. 79), and his later recognition when the driver was fleeing came in a dark area (R. 80) when the driver was on the opposite side of the car from Officer Bryant (R. 82) and when Officer Bryant only saw a single man running away from the cab (R. 79-80). According to Officer Bryant, the driver did not have a hat on when he was in the cab (R. 81).

The final witness for the prosecution was plainclothes Detective Gould, whose police car was the last one to join the chase and who actually arrested appellant in the woods. This officer described the fleeing suspect as having on a three-quarter length coat and a hat when he left the cab (R. 87).

After appellant was arrested, he was searched for weapons and money and neither was found (R. 91). The area immediately around appellant was also searched and nothing was found (R. 94). The cab was dusted for fingerprints and no fingerprints were found (R. 94).

The appellant took the stand in his own defense and explained that he was in the vicinity of the accident because he was looking for an open liquor store in Maryland. He was walking along the street when he heard the cab and police cars coming toward him. Since the cab was coming straight at him, appellant began to run. After falling twice, he got up and ran into the woods "and laid on the ground and that is where the police picked me up" (R. 7, Vol. 2).

The jury was unable to reach a verdict on counts 1 and 2 of the indictment but appellant was found guilty on count 3.

IV

ARGUMENT

Not a scintilla of extrinsic evidence was presented which linked appellant to the crimes with which he was charged. Although thoroughly searched, no money and no weapons were found on him and no fingerprints or other evidence were found in the cab. Under the circumstances, the identification of appellant by witness Marks was vital to the government's case.[1/]

In a series of decisions handed down on the same day, the Supreme Court laid down certain rules governing the admissibility of identification

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1/ Although Officer Bryant also claimed to recognize appellant, such recognition as was claimed is hardly credible. Officer Bryant was driving his police car alongside the fleeing cab at a speed of about 50 miles an hour in the dead of night when he claimed he recognized appellant.

testimony. In United States v. Wade, 288 U. S. 218, 87 S. Ct. 1926 (1967), the Court held that an accused is entitled to be represented by counsel at all pre-trial confrontations for the purpose of identification. And in Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, it was held that all of the surrounding circumstances must be examined to determine whether an accused is deprived of due process of law because of the unfairness of the confrontation. Although this court has construed the right to counsel rule of Wade as not including on-the-scene confrontations, the due process rule of Stovall still governs such identifications. Russell v. United States, 133 U. S. App. D. C. 77, 408 F. 2d 1280 (1969) And it is submitted that the facts of this case demonstrate that appellant was deprived of due process by the identifications of the witness Marks.

In the first place, although extremely certain of the appellant's identity, witness Marks "really couldn't recall" what the appellant was wearing, although he believed that he was wearing a three-quarter length coat and a hat (R. 40).[1/] When asked to describe the height of the driver (presumably the appellant), at a critical stage of his identification, witness Marks' response was "as tall as the defendant (R. 60).

1/ The appellant testified that he was wearing a waist length "blue Peters jacket" and no hat (R. 35, Vol. 2). Contrast also the testimony of witness Marks that the other passenger was wearing a leather jacket (R. 32) with the testimony of witness Scott that this same person was wearing a topcoat and a hat (R. 14). Finally, contrary to witness Marks, Officer Bryant testified that the driver "didn't have a hat on when he was in the cab"(R. 81).

Secondly, his own testimony demonstrates that Marks was extremely distraught during the later stages of the chase and after the cab crashed and came to a halt. He claimed that he remained upright in the back seat of the cab while the police were firing at the cab, even though the driver was "laying (sic) to his side, driving the car and the guy in the back seat was nearly on the floor" (R. 35). Although this testimony was somewhat contradicted by one of the police officers who claimed that Marks was crouched down in the seat (R. 72), it demonstrates either that Marks did not have sufficient presence of mind to protect himself or that he was so upset that he could not recall crouching down in the seat. Third, all of the events leading up to Marks' identification of appellant took place after 11:00 P.M. at night in and around a car which had no dome light working and where the only lights available to assist Marks in his identification were an occasional streetlight (R. 59-60). Under all of these circumstances, it is no wonder that, when the police brought appellant to the scene, handcuffed with guns trained on him, that Mr. Marks quickly "identified" appellant as the driver of the car.

As this Court stated in Russell, supra, "Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are suggestive." Especially was the confrontation of appellant with

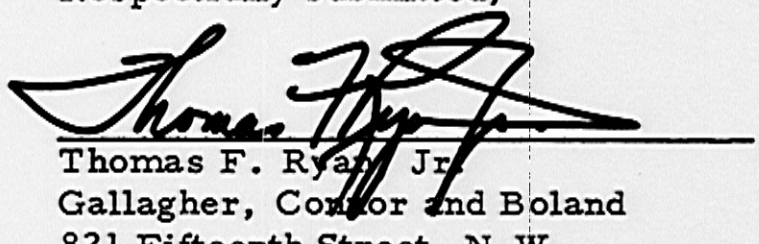
witness Marks suggestive in this case. Unlike Russell, no prior independent description of the driver of the cab had been given by witness Marks and there was, therefore, no possibility of testing independently the identification of appellant by Mr. Marks. Under all of the circumstances of this case, therefore, witness Marks should not have been permitted to testify to the on-the-scene identification of appellant. There being no other independent valid identification of appellant, the witness should also have been precluded from the in-court identification of appellant. Appellant was therefore deprived of due process of law within the meaning of Stovall v. Denno, supra.

V

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded for a new trial.

Respectfully submitted,



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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee,	)	
v.	)	Docket No. 23,108
Milton L. Hayward, Appellant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Brief for Appellant on the following:

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United States Attorney
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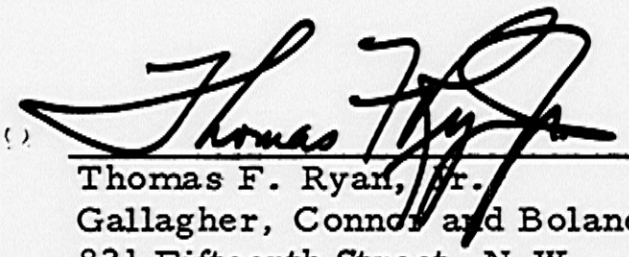

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February 24, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee,	)	
	)	Docket No. 23,108
Milton L. Hayward, Appellant.	)	

REPLY BRIEF FOR APPELLANT

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America,	)	
	)	
Appellee,	)	
	)	
	)	Docket No. 23, 108
	)	
Milton L. Hayward,	)	
	)	
Appellant.	)	

REPLY BRIEF FOR APPELLANT

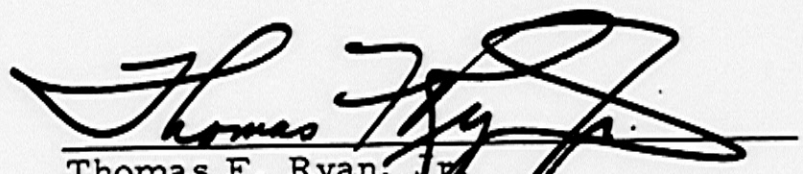
Issue has been joined as to the admissibility of the on-the-scene identification of Appellant by the witness Marks and no further argument is required on this legal question. The Government contends, however, that even if it was error to permit witness Marks to identify Appellant, such error was "harmless beyond a reasonable doubt" because of the independent identifications of three other witnesses, Scott, Bryant and Gould. However, as we shall show, the claimed identifications of these three witnesses were not credible at worst and flimsy at best. Certainly, in the absence of the identification of the key witness Marks, this court could not say that the jury would have convicted the Appellant without doubt and that, therefore, the error was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18 (1967).

Witness Scott, the owner of the cab, was unable to identify Appellant as one of the persons who commandeered his cab (Tr. 27). He did not see the face of either of the two men throughout the entire incident (Tr. 27). He did testify that one of the men wore a finger-tip coat (Tr. 28) but this is as far as he went and it is hardly the recognition of Appellant which the Government claims (Govt. br., p. 2). Witness Gould, the arresting police officer, only saw a person with dark clothes on (including a hat) (Tr. 87) and although the key witness Marks testified positively that two men jumped out of the cab by the left rear door (Tr. 65), witness Gould testified that he saw only one man leave because his view of the right side of the cab was obstructed (Tr. 92). Again, this is hardly positive identification of the Appellant.

Finally, officer Bryant's claimed identification of Appellant strains credulity. His first identification of Appellant took place while he was driving his one-man squad car alongside the cab at a speed of about fifty miles an hour (Tr. 79). In this connection, despite his positive claim of identification of Appellant's face (Tr. 73), officer Bryant testified, contrary to witnesses Marks and Scott, that the driver did not have a hat on (Tr. 81). Also, Bryant claimed to identify Appellant when the man was running away from the cab, but despite his claim that he was chasing closely, he only saw one man get out of the cab, although there were obviously two men involved who fled.

It is apparent from the foregoing that the witness Marks' identification of Appellant was crucial to the Government's case and the admission of this testimony was not "harmless beyond a reasonable doubt."

Respectfully submitted,



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May 28, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee,	)	
v.	)	Docket No. 23,108
Milton L. Hayward, Appellant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Reply Brief for Appellant on the following:

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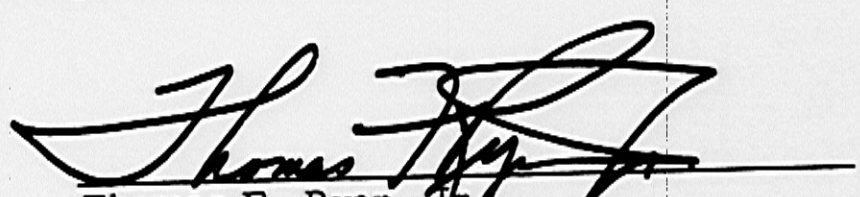

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